No. 84-902

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WARDAIR CANADA INC.,

Appellant,

v.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,

Appellee.

On Appeal From The Supreme Court of Florida

BRIEF FOR APPELLANT

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QUESTION PRESENTED

This case presents the question decided in *Japan Line, v. County of Los Angeles,* 441 U.S. 434 (1979), but is different in that the state tax involved not only violates the "one voice" standard by implicating nationally important foreign policy issues, but also violates a clear "directive" of Congress. The question presented by this appeal is:

Whether the imposition by Florida of an unapportioned fuel tax on an instrument of foreign commerce, aviation fuel,pumped from Florida based storage facilities into the aircraft of a foreign national for use as a propellant of such aircraft which are owned, based and registered abroad, and operated exclusively in international commerce is in violation of:

1. the Commerce Clause of the Constitution of the United States, Article I, Section 8, Clause 3,

2. the Supremacy Clause of the Constitution of the United States, Article VI, Clause 2, and

3. the Nonscheduled Air Services Agreement between the Government of the United States of America and the Government of Canada, TIAS 7826, 25 UST 787 (May 8, 1974).

PARTIES

The parties are those named in the caption.* However, the Solicitor General on behalf of the United States filed an *Amicus Curiae* Brief in support of Appellant's Jurisdictional Statement.

Pursuant to Supreme Court Rule 28.1, Appellant sets forth its parent company, and subsidiary (except its wholly owned subsidiary) and affiliate corporations, as follows: Wardair International Ltd. (the parent company), International Vacations Ltd., Wardair Leasing Inc., Wardair Equipment Ltd., Wardair Hawaii Limited, Wardair (U.K.) Ltd., Wardair Holidays (Deutschland) GmbH, and Wardair (France) S.A.R.L.

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* There were many foreign air carriers that challenged on Constitutional grounds the imposition of the Florida fuel tax on aviation fuel used in foreign commerce in other cases. See, U.S. Sup. Ct. Nos. 84-922, 84-1041.

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OPINIONS BELOW

The opinion of the Florida Supreme Court is reported at 455 So. 326 (Fla. 1984), and is reproduced as Appendix A in the Appendix to Appellant's Jurisdictional Statement.[1] J.S.A. at A-1 —A-7. The final judgment and opinion of the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida,

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[1]On December 2, 1985, the Court granted Appellant's motion to dispense with printing a Joint Appendix. Instead, the Appendix which accompanied Appellant's Jurisdictional Statement will be used. That Appendix will be referred to hereinafter as "J.S.A."

is not reported. It is reproduced as Appendix C in the Appendix which accompanied Appellant's Jurisdictional Statement. J.S.A. at A-21 –A-24.

JURISDICTION

The judgment of the Florida Supreme Court was entered on June 14, 1984. J.S.A. at A-1 –A-6. Appellant filed its Jurisdictional Statement on December 5, 1984, contesting the decision of the Florida Supreme Court upholding the constitutionality of a state imposed fuel tax on the grounds, that the state fuel tax legislation violates the United States Constitution to the extent it taxes the jet fuel pumped from Florida based facilities into the aircraft of an air carrier of a foreign nation to be used in that aircraft as a propellant in foreign commerce exclusively. This Court noted probable jurisdiction on November 4, 1985. The jurisdiction of this Court is involved under 28 U.S.C. sec. 1257(2).

CONSTITUTIONAL, STATUTORY, AND INTERNATIONAL AIR TRANSPORT AGREEMENT PROVISIONS INVOLVED

This case raises questions concerning the validity of certain provisions of Senate Bill 8A, Chapter 83-3, Laws of Florida, under the Commerce and Supremacy Clauses of the United States Constitution, Article I, Section 8, Clause 3 and Article VI, Clause 2, respectively, and the Nonscheduled Air Services Agreement between the United States and Canada of May 8, 1974, TIAS 7826, 25 UST 787.

The applicable provisions of The Constitution of the United States of America are:

> "Congress shall have Power . . . To regulate Commerce with foreign Nations . . . ." U.S. Const. Art. I, sec. 8, cl. 3.
>
> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2.

Relevant provisions of Florida Senate Bill 8A, are presented in S.J.A. at A-42 –A-47.

Relevant provisions of the Nonscheduled Air Services Agreement between the United States and Canada are contained in S.J.A. at A-48 –A-67.

Convention on International Civil Aviation (The Chicago Convention), 61 Stat. 1180, TIAS 1591 (signed Dec. 7, 1944, ratified by U.S. Aug. 9, 1946, effective April 4, 1947), Article 24(a):

> "Aircraft on a flight to, from, or across the territory of another contracting State shall be admitted temporarily free of duty, subject to the customs regulations of the State. Fuel, lubricating oils, spare parts, regular equipment and aircraft stores on board an aircraft of a contracting state, on arrival in the territory of another contracting State and retained on board on leaving the territory of that State shall be exempt from customs duty, inspection fees or similar national or local duties and charges . . . ."

Relevant sections of the Federal Aeronautics Act of 1958, as amended, 49 U.S.C. sec. 1301, *et seq.*, are as follows:

Section 402, 49 U.S.C. sec. 1372 are:

"(a) No foreign air carrier shall engage in foreign air transportation unless there is in force a permit issued by the Board authorizing such carrier so to engage.

* * *

"(e) The Board may prescribe the duration of any permit and may attach to such permit such reasonable terms, conditions, or limitations as, in its judgment the public interest may require."

Section 801, 49 U.S.C. sec. 1461:

"(a) The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in . . . any permit issuable to any foreign air carrier under section 402 of this Act, shall be presented to the President for review. The President shall have the right to disapprove any such Board action concerning such . . . permits solely upon the basis of foreign relations or national defense considerations which are within the President's jurisdiction. . . ."

Section 802, 49 U.S.C. sec. 1462:

"The Secretary of State shall advise the Secretary of Transportation, the Board, and the Secretary of Commerce, and consult with the Secretary of Transportation, Board, or Secretary of Commerce, as appropriate, concerning the negotiations of any agreement with foreign governments for the establishment or development of air navigation, including air routes and services."

Section 1102, 49 U.S.C. sec 1502:

"(a) In exercising and performing their powers and duties under this chapter, the Board and the Secretary of Transportation shall do so consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries. . . .

"(b) In formulating United States international air transportation policy, the Congress intends that the Secretary of State, the Secretary of Transportation, and the Civil Aeronautics Board shall develop a negotiating policy which emphasizes the greatest degree of competition that is compatible with a well-functioning international air transportation system. This includes, among other things:

(1) the strengthening of the competitive position of United States air carriers to at least assure equality with foreign air carriers, including the attainment of opportunities for United States air carriers to maintain and increase their profitability, in foreign air transportation;

(2) freedom of air carriers and foreign air carriers to offer fares and rates which correspond with consumer demand;

(3) the fewest possible restrictions on charter air transportation;

(4) the maximum degree of multiple and permissive international authority for United States air carriers so that they will be able to respond quickly to shifts in market demand;
(5) the elimination of operational and marketing restrictions to the greatest extent possible;
(6) the integration of domestic and international air transportation;
(7) an increase in the number of nonstop United States gateway cities;
(8) opportunities for carriers of foreign countries to increase their access to United States points if exchanged for benefits of similar magnitude for United States carriers or the traveling public with permanent linkage between rights granted and rights given away;
(9) the elimination of discrimination and unfair competitive practices faced by United States airlines in foreign air transportation, including excessive landing and user fees, unreasonable ground handling requirements, undue restrictions on operations, prohibitions against change of gauge, and similar restrictive practices; and
(10) the promotion, encouragement, and development of civil aeronautics and a viable, privately owned United States air transport industry.

"(c) To assist in developing and implementing such an international aviation negotiating policy, the Secretaries of State and Transportation and the Civil Aeronautics Board

shall consult, to the maximum extent practicable, with the Secretary of Commerce, the Secretary of Defense, airport operators, scheduled air carriers, charter air carriers, airline labor, consumer interest groups, travel agents and tour organizers, and other groups, institutions, and government agencies affected by international aviation policy concerning both broad policy goals and individual negotiations.

"(d) The President shall grant to at least one representative of each House of Congress the privilege to attend international aviation negotiations as an observer if such privilege is requested in advance in writing."

STATEMENT OF THE CASE

Appellant is a corporation established and existing under the laws of Canada with its principal offices and base of operation located in Canada. It is engaged in international air transportation services as a common carrier of passengers and property. Its foreign air transport service is primarily charter in character. Its international services originate largely out of Canada to destinations in Europe, the Caribbean, Mexico and the United States.

In order for a foreign air carrier such as Appellant to perform charter services to and from the United States, a license to operate in such foreign air commerce must be granted to it by the Federal Government. Appellant applied pursuant to Section 402 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1372, for such a license,a foreign air carrier permit, from the Federal Government which was

granted.[2] Under the provisions of the permit issued to Appellant by the Federal Government, (S.J.A. at A-73), Appellant's charter foreign air transportation service is limited to that authorized by the U.S./Canada Nonscheduled Air Services Agreement of May 8, 1974, TIAS 7826, 25 UST 787. S.J.A. at A-48, A-66. The term of Appellant's permit also depends on the continuation of that international bilateral agreement or another subsequent international agreement between the United States and Canada covering the same type of air service. S.J.A. at A-78. Pursuant to its foreign air carrier permit authority, Appellant operates round-trip charter[3] programs between Canada and the United States with many of those operations in and out of points in Florida.[4]

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[2]CAB Order 80-8-97 (July 18, 1980), and the foreign air carrier permit issued to Appellant pursuant to that Board order are printed in J.S.A. at A-68 –A-81.

By an exchange of diplomatic notes, dated May 24, 1984, the United States and Canada agreed to add new route authority to be operated by one U.S. air carrier, and one Canadian air carrier between Canada and Puerto Rico through an amendment to Schedules I and II of the United States—Canada Air Transport Services Agreement, TIAS 5972, 17 UST 201 (Jan. 17, 1966), as amended by TIAS 7824, 25 UST 784 (May 8, 1974). Appellant has been designated by Canada to operate a scheduled service between Toronto/Montreal, Canada, and San Juan, Puerto Rico, pursuant to the U.S./Canada exchange of diplomatic notes. Appellant has applied for a foreign air carrier permit with the Department of Transportation to perform that additional service. DOT has granted Appellant an exemption, DOT Order 85-3-50 (March 20, 1985), to operate the scheduled service during the processing of Appellant's permit application.

[3]While the U.S./Canada bilateral agreement is identified as the Nonscheduled Air Services Agreement between the United States and Canada, Annex B to that agreement defines nonscheduled air service as charter air service permitted under the terms of the agreement. S.J.A. at A-64.

The Florida legislature on or about March 3, 1983, enacted Florida Senate Bill 8A. S.J.A. at A-42. It was signed into law by the Florida governor effective April 1, 1983. Florida Senate Bill 8A imposes a 5 percent fuel tax, denominated by the Florida Department of Revenue as an excise tax, on all aviation fuel drawn from Florida storage facilities based on a calculated, not an actual price per gallon. S.J.A. at A-44 –A-45 (Fla. Stat. Ann. sec. 212.70(3)).

The challenged Florida legislation declares that the "levy of tax is upon the ultimate retail consumer." S.J.A. at A-44 (Fla. Stat. Ann. Sec. 212.70(2)(a)). The fuel supplier is designated under Florida Senate Bill 8A "as agent for the state in the collection of said tax" from the airline. S.J.A. at A-44 (Fla. Stat. Ann. sec. 212.70(2)(a)). The statute therefore intends that the actual economic burden of the fuel tax be borne by the airlines, with the supplier acting on behalf of Florida as agent to collect the tax.

All aviation fuel purchased by Appellant from Florida storage facilities and fully taxed by Florida under

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[4]Appellant's foreign commerce air services to and from the United States and Canada are governed not only by the Federal Aviation Act of 1958, as amended, and extensive regulations of the Department of Transportation issued pursuant to the authority granted to it by that Act, but Appellant's foreign commerce services are also controlled by a number of multilateral aviation agreements which the United States has entered into with numerous foreign countries including Canada. E.g., *Convention on International Civil Aviation*, 61 Stat. 1180, TIAS 1591, 15 UNTS 295 (Dec. 7, 1944); *Convention for the Unification of Certain Rules Relating to International Transportation by Air*, 49 Stat. 3000, TS 876, 137 LNTS 11 (Oct. 12, 1929).

the challenged state legislation is used exclusively in foreign commerce as an energy source to propel Appellant's aircraft used in its foreign charter air transport operations pursuant to the foreign air carrier permit issued to Appellant by the Federal Government.

Prior to the passage of Florida's aviation fuel tax, concern as to the imposition of such a tax by Florida on foreign nationals operating services in foreign air commerce was expressed in a letter to the Florida Department of Revenue, dated September 29, 1982, by the United States Department of State. S.J.A. at A-82. The U.S. State Department in that letter advised the Florida Department of Revenue of the "generally-accepted and long-standing international practice of reciprocally exempting [aviation fuel] from taxes". S.J.A. at A-83. The State Department advised:

> "The United States obligation to accord these exemptions stems from our adherence to Article 24 of the International Convention on Civil Aviation (Chicago, 1944) and to the air transport agreements which the United States has with over 70 foreign countries." S.J.A. at A-82.

The State Department concluded that: "A proliferation of state and local taxes would frustrate the international system of reciprocal tax exemptions." S.J.A. at A-83.

The Florida Department of Revenue responded stating that "Florida recognized the importance of foreign airlines . . . many years ago, and . . . the generous tax advantages allowed them have not changed." S.J.A. at A-85.

After Florida Senate Bill 8A was enacted, the U.S. State Department wrote another letter (S.J.A. at A-87) to the Florida Department of Revenue expressing "concern regarding the recent enactment of a state tax on aviation fuel", and observing that:

> "If imposed, this tax will cause serious foreign relations problems unless provision is made to exclude foreign airlines."

Shortly after Florida Senate Bill 8A became law,Appellant filed its complaint in the Leon County Circuit Court challenging the constitutionality of the law insofar as it authorizes the assessment and collection of fuel taxes from Appellant.[5] That Circuit Court held that the challenged Florida legislation did not violate the United States Constitution, but that it is inconsistent with the U.S./Canada Nonscheduled Air Services Agreement, and on that basis granted Appellant a permanent injunction from the assessment and collection of fuel taxes by Appellee. J.S.A. at A-21 –A-24.

Appellee appealed the final judgment of the Circuit Court to the intermediate appellate court; Appellant filed a cross-appeal and the intermediate appellate court certified the case to the Florida Supreme Court. On June 14, 1984, in a divided opinion the Florida Supreme Court affirmed that part of the Leon County Circuit court decision holding that Florida Senate Bill 8A is

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[5]Appellant and Appellee stipulated that, pending a final decision of this case, Appellant is permitted to self accrue the fuel tax imposed by Florida Senate Bill 8A. The funds so accrued are maintained in a segregated escrow account.

constitutional,[6] but reversed the Court's holding "to the extent that it recognized an exemption [from the assessment and collection of fuel taxes] for foreign airlines." S.J.A. at A-6.

The Florida Supreme Court missed the full scope of this Court's decisions which it cites: *Japan Line v. Country of Los Angeles,* 441 U.S. 434 (1979), and *Hines v. Davidowitz,* 412 U.S. 52 (1941). It concluded that the Nonscheduled Air Services Agreement between the United States and Canada, TIAS 7826, 25 UST 787 (1974), intended to exempt the carriers of the signatory nations "from national excise taxes" (S.J.A. at A-6), and therefore the imposition of Florida's facilities by foreign carriers for use solely in foreign commerce was not precluded by Congress (S.J.A. at A-5), nor "prevents our federal government from speaking with one voice."[7] S.J.A. at A-6. If not reversed, that decision will have adverse future repercussions affecting this Nation's ability to deal effectively with foreign nations to achieve international goals affecting this Country's national interests.

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[6]The Florida Supreme Court decision concluded that section 6 of Florida Senate Bill 8A violated the Commerce Clause of the U.S. Constitution by providing a corporate tax credit to Florida-based airlines, but that violation according to the Florida Supreme Court decision is severable from the remaining provisions of the bill without hampering the legislation's primary purpose. This aspect of the Florida Supreme Court decision is not a subject of this appeal.

[7]The Florida Supreme Court also concluded that the possibility of multiple taxation was not in issue. Appellant concurs.

SUMMARY OF ARGUMENT

Florida has imposed a fuel tax on aviation fuel uplifted from facilities in Florida into the aircraft of a foreign national, Appellant, for use as a propellant of such aircraft engaged exclusively in international air commerce.[8] A set of circumstances analogous to the circumstances of this case was considered by the Court in *Japan Line v. County of Los Angeles,* 441 U.S. 434 (1979). There, California taxed cargo containers used exclusively in international commerce owned by a national of Japan. The Court in *Japan Line* concluded that such a state tax prevents the Federal Government from uniformly regulating foreign commerce relations with foreign governments and therefore violates the commerce clause of the United States Constitution.

The Court reached its decision in *Japan Line* by considering certain international agreements (the Customs Convention on Containers primarily, see, 441 U.S. at 446 (note 10)), to which the United States and Japan were signatories granting national tax exemptions as to cargo containers used exclusively in international commerce and on the basis of the Court's analysis of the international agreements reasoned that the cargo containers of Japan Line are instrumentalities of foreign commerce. In this case there are inter-

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[8]Whether the enactment of this fuel tax by Florida violated the U.S. Constitution turns not on the characterization Florida has given the tax, but on its operation and effect. *Richfield Oil Corp.* v. *State Board of Equalization,* 329 U.S. 69 (1946).

national agreements to which the United States and Canada (Appellant is a national of Canada) are signatories granting tax exemptions for aviation fuel used exclusively in international air commerce (Chicago Convention, Art. 24(a) *supra* at 3; U.S./Canada Nonscheduled Air Services Agreements, S.J.A. at A-48 –A-67); the Chicago Convention grants the same type of tax relief for aviation fuel used by foreign nationals in foreign air commerce as the tax relief granted for Japan Line's cargo containers through the Customs Convention on Containers; the Nonscheduled Air Services Agreement, between the United States and Canada grants a tax exemption for aviation fuel "taken on board" by one nation's carriers "in the territory of the other . . . and intended solely for use in international air services". S.J.A. at A-58. If on the basis of the international agreements considered by the Court in deciding the *Japan Line* issues, the Court concluded that the cargo containers involved there were instrumentalities of foreign commerce, then the aviation fuel involved in this case must be considered as an instrumentality of foreign commerce. Certainly the concept that fuel used in commerce is an instrumentality of that commerce is not new to the Court. To the Court an "instrumentality of commerce" is a "means of commerce." *Helson v. Kentucky,* 279 U.S. 245, 251-252 (1929).

The Court in *Japan Line* concluded that while the Customs Convention on Containers did not specifically exempt the instrumentalities of foreign commerce (i.e., cargo containers) from state taxation, it "reflects a national policy to remove

impediments to the use of" instrumentalities of foreign commerce. 441 U.S. at 453. Since "California's tax . . . will frustrate attainment of federal uniformity", it "is inconsistent with Congress' power to 'regulate Commerce with foreign Nations' ", and it is therefore "unconstitutional under the Commerce Clause." 441 U.S. at 453-454. In view of the tax relief granted to aviation fuel used exclusively by Appellant in foreign commerce through the Chicago Convention and the U.S./Canada Nonscheduled Air Service Agreement it is submitted that the same conclusion should be reached in this case as to the Florida fuel tax on the aviation fuel drawn by Appellant from Florida facilities for use in foreign commerce. There can be no concern that the aviation fuel pumped into Appellant's aircraft in Florida will be used for anything other than for foreign commerce since the license granted to Appellant by the Federal Government to operate to and from the United States restricts Appellant's service to foreign air transportation.

From another perspective the Florida fuel tax violates the Constitution. When the Florida fuel tax is imposed on aviation fuel drawn from Florida storage into Appellant's aircraft for foreign commerce purposes, it violates a clear unequivocal directive of Congress. As pointed out in *Container Corp. of America v. Franchise Tax Board,* 463 U.S. 159, 194 (1983), this consideration is "essentially a species of preemption analysis." The Federal Aviation Act of 1958, as amended, and the declarations of Congress through that Act disposes of this point.

In 1978, the Congress passed the Airline Deregulation Act, 92 stat. 1705 (Oct. 24, 1978), and thereby largely deregulated U.S. domestic airline services. But foreign air transportation was not deregulated. Far from it. The regulation of the international transport system is still, through the amended Act, centrally controlled by the Federal Government. In order for any foreign air carrier to operate in and out of the United States it must apply for and be granted an operating license by the Department of Transportation (section 402 of the Act, 49 U.S.C. sec. 1372) providing in its application all of the information required by the regulations of the Transportation Department (49 CFR Pt. 211). That license usually restricts the service of the foreign air carrier to the service provided for in a bilateral air service agreement between the United States and the foreign carrier's home country. In addition, the foreign air carrier must abide by the statutory requirements and implementing Transportation Department regulations as to service, rates and fares, tariffs, service reporting, competition, and safety in foreign air transportation. An important aspect of the Federal Aviation Act from the point of view of this case, is the delegation by Congress of the power to negotiate and execute agreements with foreign nations as to foreign air transportation matters. Through section 802 of the Act, 49 U.S.C. sec. 1462, Congress delegated to the Department of State, the primary power to negotiate and execute such international agreements with foreign nations as are necessary to achieve the goals set forth in the policy statement of

section 1102 (b) of the Federal Aviation Act of 1958.

Through the provisions of the Federal Aviation Act of 1958, as amended, applicable to foreign air transportation, Congress has issued its directive: the regulation of foreign air commerce relations with foreign nations is the exclusive province of the Federal Government. Congress has declared that foreign air transportation is of such national importance that it requires the uniform exclusive regulation by the Federal Government. In foreign commerce and foreign relations affecting foreign commerce the powers of the Federal Government are exclusive and plenary; they cannot be interfered with in any way through any form of state action. *Japan Line v. County of Los Angeles,* 441 U.S. 434, 448 (1979); *United States v. Pink,* 315 U.S. 203, 233 (1942); *Hines v. Davidowitz,* 312 U.S. 52, 63 (1941); *Board of Trustees of University of Illinois v. United States,* 289 U.S. 48, 56 (1933).

Florida through the imposition of its fuel tax on the aviation fuel uplifted in Florida by Appellant and other foreign national carriers meddled in foreign relations involving foreign commerce. The reaction from foreign nations was immediate and adverse. Retaliation has been threatened. The Florida tax undermined the international air transport authority of the Federal Government. And other states have passed or are considering the passage of similar fuel tax legislation. In the field of foreign air commerce, Florida has no power to act as it did and such

action violated the commerce and supremacy clauses of the United States Constitution.

A reversal of the decision of the Florida Supreme Court will bolster the powers of the Department of State to negotiate and execute reciprocal foreign commerce arrangements with foreign nations. Such a decision will underscore the State Department's power to deal effectively with foreign nations. When disputes arise with other nations on foreign air commerce agreement matters, the State Department will be able to deal more effectively in devising a remedy since this Court will have affirmed that the State Department, through the power delegated to it by Congress, has the sole power to devise a suitable remedy.

ARGUMENT

I. THIS CASE CONCERNS THE IMPOSITION OF FLORIDA'S FUEL TAX ON APPELLANT'S AVIATION FUEL UPLIFTS THEREBY VIOLATING THE *JAPAN LINE* "ONE VOICE" STANDARD NOT ONLY BY IMPLICATING FOREIGN POLICY, BUT BY VIOLATING A CLEAR FEDERAL DIRECTIVE.

There is a clash of powers, State against Federal involved in this case; the rules which govern the outcome were adopted over two hundred years ago. Those rules, contained in the U.S. Constitution, require that:

"[W]henever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall,

> or how closely allied to powers conceded to belong to the State." *Henderson v. Wickham,* 92 U.S. 259, 272 (1876).

That very circumstance was presented to this Court for decision in *Japan Line v. County of Los Angeles,* 441 U.S. 434 (1979). The question presented was whether a state tax will "impair federal uniformity in an area where federal uniformity is essential." *Japan Line, supra* at 448. In *Container Corp. of America v. Franchise Tax Board,* 463 U.S. 159, 194 (1983), this Court commenting on the *Japan Line* "one voice" standard noted that a state tax violates that standard

> "if it either implicates foreign policy issues which must be left to the Federal Government or violates a clear federal directive. The second of these considerations is, of course, essentially a species of preemption analysis."

In *Japan Line,* the case was decided against the State since the state tax implicated foreign policy. This case, similar as it is in most respects to *Japan Line,* is different in a very important particular: the violation by the State of Florida not only "implicates" national foreign policy, but violates a clear, unequivocal "federal directive."

Just as in the *Japan Line* case, the Appellant is a foreign national engaged exclusively in international commerce, foreign air transportation. And just as in *Japan Line,* a state, Florida, is imposing a tax on an instrumentality of foreign commerce, namely, the jet fuel Appellant uplifts into its aircraft out of Florida storage facilities to be used exclusively for the purpose of propelling such aircraft in foreign air transportation services. The Court came to the conclusion in *Japan Line,* 441 U.S. at 453, that the state by

taxing the cargo containers of Japan Line, construed to be instrumentalities of foreign commerce in that case, impaired uniformity of Federal regulation as to a matter of National concern, foreign commerce, requiring uniform Federal regulation. The Court based that conclusion on international agreements to which the U.S. and Japan were parties which provided for certain tax exemptions for cargo containers used in foreign commerce, and while the agreements did not specifically bar the taxing by states of instrumentalities of commerce, they did reflect "a national policy to remove impediments to the use of" such instrumentalities of foreign commerce. *Japan Line,* 441 U.S. at 453.

In this case, the circumstances are similar to those in *Japan Line*: a state has been taxing an instrumentality of foreign commerce, aviation fuel, of a foreign national, Appellant, a Canadian. The aviation fuel is the subject of international agreements to which the U.S. and Canada are parties granting certain tax exemptions for aviation fuel used in foreign commerce. But there is a significant difference between the two cases. For in this case, in addition to the international agreements, there is a statute–the Federal Aviation Act of 1958, as amended–enacted by Congress focusing on the Federal regulation of all aspects of foreign commerce by air transport, and which delegates principally to the Department of State the power to negotiate and enter into such international agreements with foreign nations as are necessary in order to achieve the international air transport goals set out in that Act.

II. THE FLORIDA TAX ON APPELLANT'S FUEL USED IN FOREIGN AIR COMMERCE VIOLATES THE *JAPAN LINE* "ONE VOICE" STANDARD SINCE IT INTERFERES WITH "A NATIONAL POLICY" EVIDENCED BY RELEVANT INTERNATIONAL AGREEMENTS "TO REMOVE IMPEDIMENTS TO THE USE OF" INSTRUMENTALITIES OF FOREIGN COMMERCE.

A. The Aviation Fuel Pumped Into Appellant's Aircraft For Use In International Air Commerce Exclusively Is As Much An "Instrumentality Of Foreign Commerce" Requiring Uniform Federal Regulations As Was the Cargo Containers In *Japan Line*.

1. Fuel used as a propellant in commerce is an instrumentality of commerce, and the Court has said so.

There is nothing in the text of the *Japan Line* decision to indicate that the Court in using the term "instrumentalities" of foreign commerce meant it to have a meaning different from its ordinary meaning of "means", i.e., the "means" of foreign commerce. In *Helson v. Commonwealth of Kentucky,* 279 U.S. 245, 252 (1929),the Court considered fuel used as a propellant in an interstate ferryboat service as an "instrumentality of commerce" showing that by the use of that term is meant the "means of commerce":

> "A tax laid upon the use of the ferryboat would present an exact parallel. And is not the fuel consumed by propelling the boat an instrumentality of commerce no less than the boat itself? . . . [I]t is little more than repetition to say that such a tax cannot be laid upon the use of a medium by which such transportation is effected."

In this case the "instrumentality of foreign commerce" being taxed by Florida is aviation fuel pumped into the aircraft of Appellant, a foreign national, solely for the purpose of propelling Appellant's aircraft in international air commerce. There can be no transportation by air in foreign commerce without aviation fuel. Without it, aircraft are immobilized. The aviation fuel is the actual "means" of transport by aircraft. It is submitted that reasonableness dictates that the word "instrumentality" when used in *Japan Line* was used in its ordinary sense. That term should not be used differently here.

2. Just as in *Japan Line*, the Federal Government has entered into international agreements granting tax exemptions as to instrumentalities of foreign commerce, aviation fuel, requiring uniform Federal Regulations.

a. The Federal Government has agreed to grant customs duties and tax exemptions for fuel used in foreign commerce through an international Convention just as cargo containers were so exempted in *Japan Line*.

In this case the United States has entered into international agreements with foreign nations providing for tax exemptions for aviation fuel purchases when that fuel is used in foreign commerce comparable to the tax exemptions through international agreements granted to Japan Line's cargo containers involved in *Japan Line v. County of Los Angeles*, 441 U.S. 434 (1979), while in use in foreign commerce. The primary international agreement considered by the Court in *Japan Line* was the Customs Convention on Containers, TIAS 6634, 20 UST 301 (May 18, 1956), in determining that the agreement evidenced a national policy for the uniform Federal regulation

of foreign commerce. Article 24 (a) of the Convention on International Civil Aviation (The Chicago Convention), 61 Stat. 1180, TIAS 1591, ratified by the U.S. on August 9, 1946, grants a tax exemption as to aviation fuel used in foreign commerce similar to the tax exemption as to cargo containers used in foreign commerce granted through the Customs Convention on Containers, i.e., an exemption from customs duties and taxes while the instrumentality is being used by a foreign national in foreign commerce.[9] Compare, page 3, *supra*, with 441 U.S. at 446 (note 10). Canada, the United States and over 150 other nations are signatories to the Chicago Convention. The United States notes in its brief *amicus curiae* in support of Appellant's Jurisdictional Statement (pp. 11-12) that the parties to the Chicago Convention are by operation of the Convention's terms members of the International Civil Aviation Organization (ICAO), and that a committee of ICAO, the Air Transport Committee, after a study of taxation in the international air transport field adopted a resolution on November 14, 1966, that aviation fuel taken on board aircraft for consumption in international flight "shall be exempt" from various taxes, duties and charges including sales and excise taxes "by any taxing authority within a State".[10] Since the Chicago Convention grants a tax exemption to aviation fuel used in

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[9]The Federal Government also provides to foreign airlines through statutory provisions excise tax exemptions for fuel used in international air commerce on a reciprocal basis. 26 U.S.C. sec. 4221(a)(3), (d)(3), (e)(1).

[10]The *amicus* brief of the United States cites ICAO's *Policies on Taxation in the Field of International air Transport*, ICAO Doc. 8632-C/968 (Nov. 1966).

international commerce virtually identical to the tax exemption granted cargo containers when used in such commerce by the Customs Convention on Containers considered by the Court in *Japan Line*, the logical conclusion is that *Japan Line* dictates a ruling that aviation fuel used in foreign commerce by a foreign national is an instrumentality of foreign commerce requiring uniform Federal regulation.

b. In addition, in this case, the United States has entered into a bilateral agreement granting tax relief as to aviation fuel to be used in international commerce even when uplifted by a carrier of one nation within the territory of the other; Appellant's fuel uplifts in Florida fits this provision.

Article XII of the U.S./Canada Nonscheduled Air Services Agreement, TIAS 7826, 25 UST 787 (May 8, 1974), negotiated and executed on behalf of the United States by the U.S. State Department pursuant to section 802 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1462, provides that the airlines of the U.S. and Canada are exempted "to the fullest extent possible" from excise taxes, inspection fees, duties and charges on fuel

> "taken on board aircraft of the carriers of one Contracting Party in the territory of the other Contracting Party and intended solely for use in international air services . . . whether or not such items are consumed wholly within the territory of the Contracting Party granting the exemption." S.J.A. at A-58.

The United States has entered into bilateral air transport service agreements with many foreign nations granting similar tax relief as to aviation fuel used by

the foreign nations signing those agreements with the United States. S.J.A. at A-82.

c. Any aviation fuel uplifts by Appellant in the United States must be for foreign commerce purposes because its operating license issued to it by the Federal Government authorizes it to perform its air transport services exclusively in foreign air commerce.

Appellant in this case is providing a common carrier air service pursuant to a license issued to it by the Federal Government (section 402 of the Federal Aviation Act of 1958, 49 U.S.C. sec. 1372) which limits its operations to that foreign commerce service agreed to in the U.S./Canada Nonscheduled Air Service Agreement. S.J.A. at A-68 - A-78. Therefore, there can be no concern that the fuel uplifted in Florida by Appellant will be used for any purposes other than foreign commerce.

B. The Tax By Florida of Appellant's Aviation Fuel Used in Foreign Commerce Is An Interference And Actually Prevents Uniform Federal Regulation Of Foreign Commerce, And Therefore It Is In Violation Of The Foreign Commerce Clause Of The U.S. Constitution.

If the international agreements considered in *Japan Line* evidenced a "national policy to remove impediments to the use of containers" in foreign commerce, which they did, then the U.S./Canada Nonscheduled Air Services Agreement and the Chicago Convention "reflects" a similar national policy as to aviation fuel with at least the same strength and force as in *Japan Line* because the purposes of the international agreements in the *Japan Line* case,

and those in this case are indistinguishable. 441 U.S. at 453.

Since the international agreements being considered in this case demonstrate a national policy requiring uniform Federal regulation of foreign air commerce with foreign nations, there must be a consideration of whether the Florida fuel tax prevents or interferes with that uniform Federal regulation. If the Florida fuel tax violates this principle it is unconstitutional and therefore invalid. *Japan Line v. County of Los Angeles,* 441 U.S. 434 (1979). How the State of Florida and the Florida Supreme Court interprets the state tax statute in question does not affect a decision in this case, for when there is a question of whether a state tax violates the U.S. Constitution the issue turns on its operation and effect rather than the characterization given to it by the state. *Richard Oil Corp. v. State Board of Equalization,* 329 U.S. 69 (1946). The Florida tax on Appellant's aviation fuel uplifted in Florida must fail because it interferes with the uniform Federal regulation of international commerce just as did the California tax on cargo containers interfered with the uniform Federal regulation of foreign commerce in *Japan Line.*[11]

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[11]The Florida Second Circuit judgment, granting Appellant a permanent injunction against the Florida Department of Revenue from assessing and collecting fuel taxes from Appellant found "Senate Bill 8A inconsistent with the undertakings of United States government in international bilateral agreements designed to establish federal uniformity and prevent retaliatory taxes on U.S. carriers." S.J.A. at A-22.

1. The Federal Government through the State Department enters into international agreements in an attempt to achieve the goals set down by Congress in Section 1102(b) of the Federal Aviation Act, but those efforts will be diluted, diffused and contradicted if the Florida Supreme Court decision is upheld.

International air transport agreements between the United States and other nations exist on a complex world-wide basis. Pursuant to the power delegated to the Department of State through section 802 of the Federal Aviation Act, 49 U.S.C. sec. 1462, to negotiate and execute such international air transport agreements with foreign nations as are necessary to achieve the goals set forth by Congress in section 1102(b) of the Federal Aviation Act, 49 U.S.C. sec. 1502(b), bilateral and multilateral international air transport agreements have been entered into over the years by the Federal Government with other nations.[12]

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[12]President Truman in a message to the Senate submitting the Chicago Convention took note of the fact that international commercial bilateral air transport agreements had been entered into without ratification "under authority vested in me." International Civil Aviation Conference, Message from the President, 79th Cong., 2d sess. 92 Cong. Rec. 6661-6662 (June 11, 1946). The Attorney General, in supporting the President's position on executing bilateral agreements without ratification cited the Constitution plus sections 801, 802 and 1102 of the Civil Aeronautics Act of 1938, as amended, putting the air bilateral agreements in the category of "agreements made pursuant to existing legislation." 40 Op.Att'y Gen. 451 (1948). It is to be noted that one of the agreements involved was the bilateral air transport agreement between this country and the United Kingdom which has been a keystone for our transatlantic scheduled service operations. See, M. Whiteman, 14 *Digest of International Law* 219-221 (1970).

The policy of the Federal Government through its bilateral air transport agreements is exemplified by the Nonscheduled Air Services Agreement between the United States and Canada. S.J.A. at A-48. Through that agreement the Federal Government seeks to preserve, protect and promote the continued development of a system of air transportation between the U.S. and Canada able to accommodate the transportation needs of their people with a minimum of artificial restraints, free from discriminatory practices, based on the equitable exchange of economic benefits, and exemptions from taxes on the instruments of foreign air commerce, aviation fuel being one such instrument of foreign commerce. S.J.A. at A-48 –A-49, A-58, A-59.

That international air transport agreement and the policy it adopts is not novel. It is entirely consistent with the international air transportation policy contained in section 1102(b) of the Federal Aviation Act, 49 U.S.C. sec. 1502(b). There are may international bilateral agreements with objectives similar to those of the U.S./Canada Nonscheduled Air Services Agreement including provisions providing for an exemption from taxes on aviation fuel.[13] The United States has

[13]E.g., Art. 7(d) *Aviation Transport Services Agreement,* United States/Colombia, TIAS 5338, 14 UST 432 (Oct. 24, 1956); Art. 7(d) *Air Transport Services Agreement,* United States/Mexico, TIAS 4675, 12 UST 60 (Aug. 15, 1960); Art. 4(c) *Air Transport Services Agreement,* United States/Venezuela, TIAS 2813, 4 UST 1495 (April 13, 1953); Art. 3(b) *Commercial Air Transport Agreement,* United States/Ecuador, TIAS 1606 (Jan 8, 1947), as amended TIAS 2196, 2 UST 482 (Jan. 3, 10, 1951); Art. 3(2) *Air Transport Services Agreement,* United States/United Kingdom, TIAS 1507 (Feb. 11, 1946); Art. 3(b) *Air Transport Services Agreement,* United States/Chile, TIAS 1905 (May 10, 1947); Sec. F(2,3) *Air Transport Services Agreement,* United States/Argentina, TIAS 8978, 29 UST 2795 (Sept. 22, 1947).

bilateral air transport agreements with over 70 foreign countries. See, S.J.A. at A-82.

The success of the Federal Government in achieving the purposes of Congress' international air transport policy may be seriously jeopardized, compromised to the point of failure if the decision of the Florida Supreme Court is affirmed, since its negotiations would be forced to consider the local interests of each individual state that expresses an interest in international affairs affecting foreign air transportation as well as the interest of the involved foreign nation. Such a situation would be intolerable and totally unnecessary. The "one voice" principle must prevent such a scenerio from happening in foreign air transportation.

2. The Federal Government has been aggressive and persistent in its efforts to eliminate fuel tax discrimination as to U.S. carriers by other nations, but a fuel tax by Florida or other states will jeopardize such efforts.

The Federal Government pursuant to its continuing policy has been aggressive in its efforts to eliminate the imposition of fuel taxes on U.S. air carriers imposed by other nations.[14] Quite naturally, the imposition of such a tax by an individual state of this

[14]Civil Aeronautics Board ("CAB"), Fiscal Year ("FY") 1982/1981 Report to Congress at 94–96; CAB, FY 1980 Report to Congress at 84; CAB, FY 1979 Report to Congress at 103; CAB, FY 1978 Report to Congress at 96; CAB, FY 1977 and Transition Quarter Report to Congress at 106–109, 114–115; CAB, FY 1976 Report to Congress at 103–104.

Nation on the aviation fuel uplifts of foreign airlines jeopardizes those efforts. That is a key problem with the Florida fuel tax. In its letters to Florida's Department of Revenue (S.J.A. at A-82, A-87), the U.S. State Department warned Florida that the imposition of its fuel tax on foreign airlines would "frustrate" the purposes of the international air transport agreements entered into by the Federal Government with foreign nations and the reciprocal arrangements that have been established by the Federal Government, and that a Florida fuel tax would trigger retaliation through the imposition of similar taxes by foreign governments on the airlines of the United States generally. S.J.A. at A-82 –A-83.

Just as predicted by the State Department, when Florida imposed its enacted fuel tax on the aviation fuel pumped into the aircraft of foreign nationals from Florida storage the response by foreign governments to the enactment of the Florida fuel tax was immediate and adverse. The brief *amicus curiae* of the United States supporting Appellant's Jurisdictional Statement shows (p. 21, and the attached Appendix) that there were protests from about 25 foreign countries. The tax was perceived by them as a tax on aviation fuel and an agreement breach by the Federal Government which may affect this Nation's foreign air transport system through possible retaliatory measures by the foreign governments. *Supra* at 22.

3. The fuel tax imposed by a state of the United States is viewed by foreign nations as a national tax.

The acts of the individual state governments of the United States affecting foreign commerce are per-

ceived by foreign nations as if they are the acts of the Federal Government, as if those acts were acts of the National Government even when those state acts are without Federal support and are opposed to Federal foreign policy. *Japan Line v. County of Los Angeles,* 441 U.S. 434, 450-451, 453 (1979); *United States v. Pink,* 315 U.S. 203, 232-233 (1942); *United States v. Belmont,* 301 U.S. 324, 331 (1937); *Board of Trustees of University of Illinois v. United States,* 289 U.S. 48, 57 (1933). From the standpoint of foreign nations, a tax on fuel used in foreign commerce by foreign nationals is a national tax, no matter its origins or whether sanctioned by the Federal Government since in foreign relations matters their dealings with the United States are with the Federal Government and to them, the individual states do not exist. *United States v. Belmont, supra* at 330-331. If a state action involving foreign relations and commerce runs counter to the terms agreed to by the Federal Government through its international agreements such state action is considered by the foreign government involved as a breach of the international obligations assumed by the Federal Government. The continued effectiveness of the Federal Government in international affairs without exclusive powers in that field would be jeopardized critically. On that basis, the Court in *Japan Line,* 441 U.S. at 450-451, concluded that a state tax on an instrumentality of foreign commerce used by a foreign national exclusively in international commerce violated the commerce clause of the U.S. Constitution:

> "If a novel state tax creates an asymmetry in the international tax structure, foreign nations disadvantaged by the levy may retaliate against

American-owned instrumentalities present in their jurisdictions. Such retaliation of necessity would be directed at American transportation equipment in general, not just that of the taxing State, so that the Nation as a whole would suffer. If other States followed the taxing State's example, various instrumentalities of commerce could be subjected to varying degrees of multiple taxation, a result that would plainly prevent this Nation from 'speaking with one voice' in regulating foreign commerce." Footnote omitted.

4. If other states impose a tax similar to Florida's–which has happened–the intrusion on the uniform Federal regulation of foreign commerce will be aggravated further; this prospect was important in the *Japan Line* decision that a state's taxing of a instrumentality of foreign commerce used in that commerce by a foreign national is unconstitutional.

With other states of the United States adopting a similar tax on aviation fuel used in foreign air commerce by foreign airlines[15] the intrusion by the individual states in foreign air commerce and the inevitable retaliatory responses by foreign nations to such taxation will further erode the ability of the Federal Government to achieve viable working relationships with other nations so necessary to foster a sound and effective international air transport system. The power of the Federal Government to achieve the goals in foreign air transportation set out in sec-

[15]The brief *amicus curiae* of the United States (pp. 33–34) in support of Appellant's Jurisdictional Statement shows that at least three other states—Illinois, Massachusetts, and California—have enacted or are contemplating the enactment of fuel tax legislation to tax the aviation fuel of foreign air carriers.

tion 1102(b) of the Federal Aviation Act, 49 U.S.C. sec. 1502(b), would be seriously weakened. The ability of the Federal Government to fulfill its obligations under international air transport agreements and such reciprocal arrangements as it may agree to with other nations would be substantially impaired. The inevitability of this sequence of events was the basis for this Court to hold that a tax by a state on a foreign national's instrumentalities of foreign commerce is unconstitutional. *Japan Line v. County of Los Angeles,* 441 U.S. 434, 450-454 (1979). The same conclusion is applicable to the state fuel tax involved in this case: the Florida fuel tax as it is applied to Appellant's uplift of aviation fuel for foreign commerce purposes violates the Commerce Clause of the United States Constitution.

5. The conclusion reached in *Japan Line* that the taxing by a state of an instrumentality of commerce used exclusively in foreign commerce by a foreign national violates the Constitution's Commerce Clause is the conclusion required by the circumstances of this case.

In *Japan Line,* 441 U.S. 434 (1979), the question before the Court concerned the imposition of a state tax on cargo containers used exclusively in international commerce by their foreign national owner. In reaching its decision in *Japan Line,* the Court considered certain international agreements (*Japan Line,* 441 U.S. at 446 (note 10)) to which the United States is a party exempting such containers from import duties and tax while they are in use in foreign commerce. It was on the basis of the tax exemptions granted in the international agreements considered by the Court in *Japan Line* that it concluded that the cargo containers of Japan Line while used in foreign

commerce are instruments of foreign commerce. The Court then concluded that the international agreements "evidenced" the "desirability of uniform treatment of containers used exclusively in foreign commerce" (441 U.S. at 452), and "California's tax . . . will frustrate attainment of federal uniformity." 441 U.S. at 453. The Court concluded that "[f]oreign commerce is pre-iminently a matter of national concern" which the Constitution commits to the exclusive authority of the Federal Government to regulate (441 U.S. at 448), and therefore the taxing of "instrumentalities of foreign commerce" (441 U.S. at 445-446), the cargo containers of Japan Line, by a state is "unconstitutional under the Commerce Clause." 441 U.S. at 454. With the circumstances of this case so comparable to the circumstances in *Japan Line,* the same conclusion must be reached as to the Florida fuel tax: the Florida tax when imposed on Appellant's aviation fuel uplifts in Florida into Appellant's aircraft for solely foreign commerce purposes is "unconstitutional under the Commerce Clause." 441 U.S. at 454.

III. CONGRESS HAS ISSUED A CLEAR DIRECTIVE THROUGH THE FEDERAL AVIATION ACT THAT THE FEDERAL GOVERNMENT HAS THE EXCLUSIVE REGULATORY POWER OVER FOREIGN AIR COMMERCE.

A. A Foreign Air Carrier Such As Appellant Cannot Operate In Foreign Air Commerce To And From The United States Without A License To Do So Issued To It By The Federal Government Pursuant To The Federal Aviation Act.

Appellant, based in Canada, operates its common carrier air service, to and from the United States pursuant to operating authority granted to it by, and subject to the strict regulations of the Federal Government (the Department of Transportation, and the Department of State, principally).[16] Its Canada-U.S. charter air services are licensed by the Federal Government through a foreign air carrier permit (S.A.J. at A-73) granted to Appellant by the Civil Aeronautics Board pursuant to section 402 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec.1372.[17] CAB Order 80-8-97 (S.J.A. at A-68), is-

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[16]Effective January 1, 1985 (section 1601(b)(2) of the Federal Aviation Act of 1958, as amended, 49 U.S. C. sec. 1551(b)(2)) "The authority of the Civil Aeronautics the Board under this Act with respect to foreign air transportation is transferred to the Department of Transportation which shall exercise such authority in consultation with the Department of State." Section 1601(b)(1)(B) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1551(b)(1)(B).

[17]Only a "foreign air carrier" may obtain an operating permit to engage in foreign air transportation pursuant to section 402 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1372. A "foreign air carrier" is defined by section 101 (22) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1301(22), to mean "any person, not a citizen of the United States, who undertakes . . . to engage in foreign air transportation." Foreign air transportation is defined by section 101(24) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1301 (24), to mean "the carriage by aircraft of persons or property as a common carrier for compensation or hire in com-

suing a foreign air carrier permit to Appellant, shows that said order and permit were presented to the President of the United States pursuant to section 801(a) of the Federal Aviation act of 1958, as amended, 49 U.S.C. sec. 1461(a), to determine whether the permit would be disapproved by him on the basis of "foreign relations or national defense considerations", and the President on August 18, 1980, notified the CAB that the President did not intend to issue a disapproval. S.J.A. at A-71 (note 2). The permit limits explicitly Appellant's Canada-U.S. service to that authorized by the Nonscheduled Air Services Agreement between the United States and Canada, TIAS 7826, 25 UST 787, (May 8, 1974). S.J.A. at A-48.

B. The Power to Regulate All Aspects Of Foreign Air Commerce—Licensing, Service, Competition, Rates, Tariffs, Safety And The Negotiation And Execution Of Air Transport Agreement With Foreign Nations—In Accordance With The Goals Set Forth In The Federal Aviation Act Has Been Reserved To The Federal Government By Congress.

The broad breadth of the Federal regulatory control over foreign air transportation is of great significance here. The circumstances involved in *Japan Line* v. *County of Los Angeles,* 441 U.S. 434 (1979), did not include the pervasive Federal regulatory dominance which exists in this case as to foreign commerce by air transport. Foreign air commerce between this Nation and others is no *laissez-faire* field of service.

merce between . . . a place in the United States and any place outside thereof. . . ." U. S. nationals generally obtain authority to operate in foreign air transportation through section 401 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1371.

International air transportation is a highly structured segment of foreign commerce strictly controlled by the Federal Government. That tight Federal control has survived and under current legislation will continue to survive the almost complete deregulation of the domestic field of air transport through the passage of the Airline Deregulation Act of 1978, 92 Stat. 1705 (Oct. 24, 1978). The course and composition of foreign air commerce is shaped by the Federal Government through its powers over licensing, route services and other air services,[18] rates and fares,[19] tariffs,[20] competition,[21] safety,[22] and most important

[18]As to foreign air carriers such as Appellant, section 402 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. 1372 is the chief licensing provision. 14 CFR Pt. 211 sets out the evidence requirements to be contained in permit applications. Examples of regulations controlling services performed in foreign commerce by foreign carriers operating pursuant to section 402 licenses are: 14 CFR Pts. 212, 214 and 380 (charter services), 213 (scheduled service), 216 (commingling of blind sector traffic), 217 (service reporting), 218 (aircraft leasing with crew), 222 (intermodal cargo service), 375(foreign civil aircraft navigation within U.S.).

[19]Section 404(b), 49 U.S.C. sec. 1374(b), and sec. 1002(f), 49 U.S.C. sec. 1482(f).

[20]Section 403, 49 U.S.C. sec. 1373, and 14 CFR Pt. 221.

[21]The Federal Aviation Act of 1958 was amended to achieve a better competitive environment in the international air transport field through the International Air Transportation Competition Act of 1979, 94 Stat. 35 (Feb. 15, 1980), H.R. Reps. No. 96-716 (Conf. Rep.) 96th Cong., 1st Sess. 1-2 (1979). See, sec. 411, 49 U.S.C. sec. 1381; sec. 1102(b), 49 U.S.C. sec. 1502(b); and 49 CFR Pt. 91 (Int'l Air Transportation Fair Competition).

[22]Section 601, 49 U.S.C. sec. 1421. The power granted by this section of the Act is over safety regulation in "air commerce." Section 101(4) of the Act, 49 U.S.C. sec. 1301(4) defines "air commerce" to include "foreign air commerce."

here, the extensive power delegated to the Department of State by Congress through section 802,[m] 49 U.S.C. sec. 1462, and section 1102(a),(b),(c),(d), to negotiate air transport agreements with foreign nations in order to move toward the realization of the Federal foreign air transport goals set forth in section 1102(b) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1502(b). Section 1102(a) of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1502(a), requires the Department of Transportation in administering the Federal Aviation Act to regulate foreign air transportation in accordance with obligations assumed by the United States through such agreements.

In essence the goals set forth in section 1102(b) of the Federal Aviation Act seek a fully competitive foreign air transportation system free to the maximum extent possible from government interferences. The ability of the Federal Government to negotiate air transport agreements of various types with other nations without hindrance by any of the individual states of the Nation is an imperative. The United States Congress has demonstrated in direct terms through

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[m]Section 802 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. sec. 1462, is virtually identical to section 802 of its predecessor aeronautics act, the Civil Aeronautics Act of 1938. The Conference Report as to section 802 of the latter act states that "This section authorizes negotiations by the State Department of agreements with foreign governments for the establishment of air routes and services between the United States and foreign countries . . . . Section 802 of the conference agreement merely requires the State Department to advise the Authority of all negotiations relating to such matters and consult with the Authority with respect to them." H. R. Rep. No. 2635 (Conf. Rep.), 75th Cong. 3d sess. 76 (1938).

the Federal Aviation Act that foreign air transportation is of such national interest that it requires the uniform exclusive regulation by the Federal Government. As the Court concluded in *Henderson v. Wickham*, 92 U.S. 259, 273 (1876):

> "A regulation [the Federal Aviation Act of 1958, as amended, in this case] which imposes . . . conditions on those engaged in *native* commerce with foreign nations must *of necessity* be national in its character."

And "in matters where the national importance is imminent and direct even where Congress has been silent the States may not act at all." *Sanitary District of Chicago v. United States*, 266 U.S. 405, 426 (1925).

In this case there has been no Congressional silence. Congress has expressed itself forcefully. Congress has declared through the Federal Aviation Act of 1958, as amended, that the field of foreign air transportation is of the uppermost national importance requiring regulation by the Federal Government exclusively. It has provided for the licensing of foreign as well as U.S. air carriers, provided for the regulation of that industry's air services, competition and safety requirements. It has also enacted an international air transportation policy and delegated to the Department of State the power to negotiate and execute those agreements with foreign governments as are necessary to achieve the policy goals Congress enacted. Congress left no room for local government participation. The enactment of the Federal Aviation Act is a clear directive by that branch of the Federal Government which has the plenary power to regulate foreign commerce:

> "The power to regulate commerce with foreign nations is expressly conferred upon Congress, and, being an enumerated power, is complete in itself, acknowledging no limitations other than those prescribed in the Constitution." *Butterfield* v. *Stranahan*, 192 U.S. 470, 492-493 (1904).

The power of Congress over foreign commerce is "exclusive and absolute." *Butterfield, supra* at 492-493. In the field of foreign air commerce, Florida has no power to act as it did.

C. When Congress Issues A Directive, As It Did Here, Reserving All Power To Regulate Foreign Air Commerce To The Federal Government, Such Powers Cannot Be Interfered With In Any Way Through Any Form Of State Action; Florida's Fuel Tax On Appellant's Aviation Fuel Used In Foreign Commerce Is Just Such An Interference And It Therefore Violates The Commerce And Supremacy Clauses of the Constitution.

When Florida passed its legislation taxing aviation fuel used by Appellant and other foreign nationals solely for foreign air commerce purposes, it exceeded its powers and entered a field reserved exclusively to the Federal Government. It intruded itself into the realm of Federal foreign policy involving as it does foreign air commerce relationships with other nations, an area in which Congress holds the power exclusively, where policy considerations and the power to

achieve foreign air transportation goals have been vested by the Congress of the United States in the Federal Government. Congress issued a directive through the enactment of the Federal Aviation Act of 1958, and its many amendments. Congress declared that foreign air transportation is of such national importance that it is to be regulated by the Federal Government. It enacted an international air transportation policy, and delegated to the Department of State the power to negotiate such agreements with foreign nations as are necessary to achieve the goals set forth in the policy statement of Congress.

Under such circumstances as enumerated above, the interference by Florida through its fuel tax legislation involving international air commerce affairs is not tolerated by the Constitution. The court has stressed repeatedly that:

> "In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power." *Board of Trustees of University of Illinois* v. *United States*, 289 U.S. 48, 59 (1933).

In *United Stated* v. *Pink*, 315 U.S. 203, 232-233 (1942), the Court held that:

> "If state action could defeat or alter our foreign policy, serious consequences might ensue. The nation as a whole would be held to answer if a State created difficulties with a foreign power. . . .
>
> ". . .No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is

vested in the national government exclusively. . . ."

And in *United States* v. *Belmont,* 301 U.S. 324, 330-331 (1937), the Court stated this principal of exclusivity in these clear terms:

> "Government power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government. . . .
>
> * * *
>
> ". . . In respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. As to such purposes the state of New York does not exist. . . ."

Congress, through the provisions contained in the Federal Aviation Act of 1958, as amended, has left no area of foreign air commerce in which any state of the United States may exert any unilateral powers. In foreign air commerce and foreign relations affecting foreign air commerce the powers of the Federal Government are exclusive and plenary, and therefore they cannot be interfered with in any way through any form of state action. *Japan Line* v. *County of Los Angeles,* 441 U.S. 434, 448 (1979); *United States* v. *Pink,* 315 U.S. 203, 233 (1942); *Hines* v. *Davidowitz,* 312 U.S. 52, 63 (1941); *Board of Trustees of University of Illinois* v. *United States,* 289 U.S. 48, 56 (1933). Florida, like the other individual states, has no powers in this field:

> "The Federal Government, representing as it does the collective interests of the . . . states, is entrusted with full and exclusive responsibility for the conduct of affairs with foreign sovereignties. 'For local interests the several states of the Union exists, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.' Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference." Footnote omitted. *Hines* v. *Davidowitz,* 312 U.S. 52, 63 (1941).

Florida's enactment of Florida Senate Bill 8A insofar as it taxes the aviation fuel pumped from Florida facilities for use by foreign nationals in foreign air commerce exceeds the powers granted to it under the Constitution of the United States, and therefore, such legislation violates the United States Constitution, notonly the Commerce Clause, but the Supremacy Clause as well.

D. A Decision Holding That Florida Violated The U.S. Constitution By Imposing A Fuel Tax On Appellant's Aviation Fuel Used In Foreign Commerce Will Affirm The Exclusive Power Of The Federal Government To Negotiate And Execute International Air Transport Agreements And To Devise Solutions When There Are Foreign Relations Problems, Without A Concern That Any State Or Local Government Might Interfere.

A decision by this Court that the enactment by Florida of a fuel tax on fuel uplifted in Florida by Appellant and other foreign nationals for exclusively international air commerce purposes violates a directive of Congress will not impair the power of the Department of State to negotiate and execute reciprocal arrangements with foreign nations needed to

achieve section 1102(b) goals. For if the Department of State has that power today—and it does—it does not lose that power by such a decision. Such a decision affirms that power and protects it from future challenge. It prohibits the states from taxing instruments of foreign commerce operated by foreign nationals except to the extent authorized by the Federal Government. It also gives to the Department of State the power to deal more effectively with foreign nations when disputes arise since the Federal Government through the Department of State has the sole power to devise the remedy it believes will suit the problem.

Here, there is a clear Congressional directive through the provisions of the Federal Aviation Act that in the field of foreign air commerce it is the Federal Government that calls the tune. It is the Federal Government that is the conductor of the music, deciding how it is to be played and who are the players. It should be able to do so with total control of the harmony, free from any discordant drummers with a different tune in mind. A reversal of the decision of the Florida Supreme Court will accomplish this task.

CONCLUSION

For the foregoing reasons, it is earnestly requested that the decision of the Florida Supreme Court be reversed.

Respectfully submitted,

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